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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

LESLIE RAY COX, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE NON-IDENTITY ISSUE	1
II. THE PATTERN ISSUE	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

Apparel Art Int'l, Inc. v. Jacobson, 967 F.2d 720 (1st Cir. 1992) 7, 8
B.F. Hirsch v. Enright Ref. Co., 751 F.2d 628 (3d Cir. 1984) 3, 4
Bennett v. United States Trust Co. of New York, 770 F.2d 308 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986) 3
Brady v. Dairy Fresh Prods. Co., 974 F.2d 1149 (9th Cir. 1992) 4
Brittingham v. Mobil Corp., 943 F.2d 297 (3d Cir. 1991) 4, 5
Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990) 3, 4
D&S Auto Parts, Inc. v. Schwartz, 838 F.2d 964 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988) 3, 4
Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1298 (1994) 3
Gasoline Sales, Inc. v. Aero Oil Co., Civ. No. 93-7555, 1994 WL 593132 (3d Cir. Mar. 1, 1994) 5
Glessner v. Kenny, 952 F.2d 702 (3d Cir. 1991) 5
H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) 7
Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) 3
Lorenz v. CSX Corp., 1 F.3d 1406 (3d Cir. 1993) 5, 6
Luthi v. Tonka Corp., 815 F.2d 1229 (8th Cir. 1987) 6
Roeder v. Alpha Indus. Inc., 814 F.2d 22 (1st Cir. 1987) 7
Schofield v. First Commodity Corp. of Boston, 793 F.2d 28 (1st Cir. 1986) 3, 5
Yellow Bus Lines, Inc. v. Drivers Local 639, 883 F.2d 132 (D.C. Cir. 1989), *aff'd in pertinent part*, 913 F.2d 948 (D.C. Cir. 1990), *cert. denied*, 501 U.S. 1222 (1991) 2, 5

STATUTES

18 U.S.C. § 1962(a) 2-3
18 U.S.C. § 1962(c) ..... *passim*

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondents' Brief in Opposition ("Opp.") attempts (a) to wish away the circuit conflict that the court below freely acknowledged on the central RICO issue raised by our first question presented, and (b) to rewrite the decision below on the second question presented in order to bring that decision into line with the conflicting decisions of five other circuits.[1]

I. THE NON-IDENTITY ISSUE

A. In expressly refusing to join the eleven circuits that have adopted the "non-identity rule" for construing 18 U.S.C. § 1962(c), the court below stated that it

[1] In so doing that brief also grossly distorts the facts of this case. But at this jurisdictional stage those factual distortions are beside the point since none alters the essential character of the legal issues presented to this Court. We therefore leave the correction of those distortions to the merits papers.

was "squarely reject[ing]" the "law of other circuits." Pet. App. 32a-33a. *See* Pet. 9-14. Yet respondents contend that there is no circuit conflict, because the non-identity rule adopted by the other circuits applies only to "innocent victim" or "legitimate" enterprises, Opp. 12-15. Respondents' "innocent enterprise/guilty enterprise" dichotomy has no predicate in the circuit decisions interpreting § 1962(c). This ritual incantation for making the circuit conflict that the court below acknowledged disappear, has no such magic power.

1. In terms, § 1962(c) provides for liability for "any person employed by or associated with any enterprise" who "conduct[s] or participate[s] . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." As our petition details, eleven circuits have interpreted this language to mean that an entity cannot be both the "enterprise" and the defendant in a claim predicated on subsection 1962(c), and accordingly have adopted the so-called "non-identity" rule. *See* cases cited in Pet. 10 n.5. The court below in contrast has "squarely rejected the non-identity rule." Pet. App. 32a-33a.

2. The phrase "any enterprise" in subsection (c) is not limited or qualified in any respect. There is no basis in that phrase for a distinction between categories of "enterprises." The District of Columbia Circuit case that respondents cite, Opp. 13 n.8, makes explicit what is implicit in the decisions of all of the circuits that have adopted the non-identity rule: "[T]he requirement of non-identity of person and enterprise . . . places some corrupt organizations beyond reach." *Yellow Bus Lines, Inc. v. Drivers Local 639*, 883 F.2d 132, 140 (D.C. Cir. 1989), *aff'd in pertinent part*, 913 F.2d 948 (D.C. Cir. 1990), *cert. denied*, 501 U.S. 1222 (1991).[2]

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[2] This understanding of subsection (c) does *not* mean, as respondents suggest, that an enterprise "could never be held liable under RICO," Opp. 15, for the acts of its officers or agents. The court pointed out in *Yellow Bus* that another prohibitory subsection of RICO, § 1962(a)—which makes it unlawful to invest the financial

3. The decisions respondents have cited from the Second, Fourth, Sixth, Seventh, and Ninth Circuits all hold unequivocally that an entity cannot be both the defendant (the "person") and the "enterprise" under § 1962(c). The analysis adopted in those cases is incompatible with respondents' notion that the phrase "any enterprise" in § 1962(c) applies only to some "enterprises"; and, certainly, none of the cases cited by respondents articulates an "innocent enterprise/guilty enterprise" distinction.[3]

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proceeds of racketeering activities in an enterprise—does not contain the language that is the predicate for the non-identity rule under subsection (c), and therefore an enterprise that has *received the financial proceeds* of the racketeering acts of its agents may be held liable under subsection (a). *See* 883 F.2d at 140. Two of the other cases respondents have cited—*Busby v. Crown Supply, Inc.*, 896 F.2d 833, 838 n.5 (4th Cir. 1990); and *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 968 n.5 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988)—make the same point. *See also Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 31 (1st Cir. 1986) ("an interpretation that insulates the enterprise from liability under section 1962(c) is not inconsistent with the remedial purposes of RICO . . . [because] a culpable enterprise may be held liable under another section of RICO, § 1962(a)"); *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 401-02 (7th Cir. 1984) ("As we read subsection (c), the 'enterprise' and the 'person' must be distinct. However, a corporation-enterprise may be held liable under subsection (a) when the corporation is also a perpetrator."), *aff'd*, 473 U.S. 606 (1985); *B.F. Hirsch v. Enright Ref. Co.*, 751 F.2d 628, 633 (3d Cir. 1984) (to criticize the non-identity rule as "permit[ting] a corrupt corporation to evade punishment" is misguided because that criticism ignores the distinctions between subsection (c) and subsection (a)).

[3] *See Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 315 (2d Cir. 1985) (cited in Opp. 14 n.8) ("[R]equiring a complaint to distinguish between the enterprise and the person conducting the affairs of that enterprise in the prohibited manner is supported by the plain language of section 1962(c), which clearly envisions two entities . . . Thus, we follow the majority view and hold that under section 1962(c) a corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity."), *cert. denied*, 474 U.S. 1058 (1986); *Davis v. Mutual Life*

4. Contrary to respondents' suggestion, *see* Opp. 13, the Third Circuit's decision in *Brittingham v. Mobil Corp.*, 943 F.2d 297 (3d Cir. 1991), does not relax the non-identity rule in that Circuit. The *Brittingham* court observed that "the plain language of the statute provides that the person must be 'employed by or associated with' —*and therefore separate from*—the enterprise." *Id.* at 300 (emphasis added) (quoting *B.F. Hirsch v. Enright Ref. Co.*, 751 F.2d 628, 633 (3d Cir. 1984)). That court added that liability for the alleged enterprise is precluded by the terms of § 1962(c) even though "the enterprise may often benefit from the RICO violations." *Id.*

Indeed, in the portion of the opinion respondents have cited, *Brittingham* holds that the non-identity rule required the dismissal of a § 1962(c) claim even though the complaint, on its face, did not identify the defendant as the "enterprise," because in reality the defendant was not truly distinct from the affected enterprise. *Id.* at 300-03. Respondents are left to build a monument to a rather obscure, and in any event inapplicable, *dictum* in *Brittingham* and, as we show in the margin, respondents do

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Ins. Co. of New York, 6 F.3d 367, 377 (6th Cir. 1993) (cited in Opp. 15) ("for purposes of section 1962(c), a corporation cannot be both the 'enterprise' and the 'person' conducting or participating in the affairs of that enterprise"), *cert. denied*, 114 S. Ct. 1298 (1994); *Busby v. Crown Supply, Inc.*, 896 F.2d 823, 840 (4th Cir. 1990) (cited in Opp. 13 n.8) (there is "no occasion now to question [the] correctness" of the rule, "widely followed throughout the circuits" other than the Eleventh, that "the alleged 'person' who violates § 1962(c) must be different from the 'enterprise'"); *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 967 (7th Cir.) (cited in Opp. 13 and 14 n.8) ("Subsection (c) requires that the liable person and the enterprise be separate entities."), *cert. denied*, 486 U.S. 1061 (1988); *Brady v. Dairy Fresh Prods. Co.*, 974 F.2d 1149, 1154-55 (9th Cir. 1992) (cited in Opp. 13 n.8) (employer may be held liable under § 1962(c) only "when the employer [of the wrongdoers] is distinct from the enterprise").

not succeed at that project.[4] Thus, nothing in *Brittingham* suggests that respondents' "innocent enterprise/guilty enterprise" dichotomy has been adopted by the Third Circuit.[5]

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[4] Respondents quote *dictum* in *Brittingham* that "'[i]t is theoretically possible for a corporation to take a separate "active" role in RICO violations also committed by its employees,'" such that "'[t]he corporation would not be the passive victim, but the active perpetrator.'" Opp. 13 (quoting 943 F.2d at 302). The "possibility" to which the court referred is that if a corporation "had a role in the racketeering activity that was *distinct from* the undertakings of those acting on its behalf," 943 F.2d at 302 (emphasis added), it might be permissible under § 1962(c) to describe the "enterprise" as an association-in-fact consisting of the individual corporate agents and the corporation, and in that case the "enterprise" (the association-in-fact) would be distinct from the defendant "person" (the corporation). In *Brittingham* the plaintiffs' effort to present this issue failed because there was no evidence "that the defendant corporations, in contrast to individuals or entities acting on their behalf, took a distinct role in the alleged racketeering activity." *Id.* at 303. Similarly here, plaintiffs have not alleged and could not maintain that the Union played a distinct role in the alleged racketeering activity separate and apart from the acts of the various individuals whom respondents allege were "acting on [the Union's] behalf." *Id. See also Gasoline Sales, Inc. v. Aero Oil Co.*, Civ. No. 93-7555, 1994 WL 593132, at *3 (3d Cir. Mar. 1, 1994); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1412 (3d Cir. 1993); *Glessner v. Kenny*, 952 F.2d 702, 712 (3d Cir. 1991).

[5] It is worthy of note that a number of circuits have expressly rejected the proposition that allegations of the type respondents advance as to why the Union is not "innocent"—*viz*, that "[the Union's] officials pursue[d] their own interest instead of those of the rank-and-file workers," Opp. 14, and that high-ranking Union officers allegedly "approved of and concealed" the actions of Rich and Phillips after the fact, Opp. 12—can subject an "enterprise" to liability under § 1962(c). In these circuits, the consequence of such facts, if proved, is only that *the individual officers or officials involved* could be held liable under RICO. *See, e.g., Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 33 (1st Cir. 1986) (no "enterprise" liability under § 1962(c) for "acts of high corporate officials"); *Yellow Bus* (no liability of union "enterprise" under § 1962(c) for acts of union trustee and business agent);

B. To be sure, respondents seek to blunt the force of the Eleventh Circuit's "square[] reject[ion of] the non-identity rule" (Pet. App. 32a-33a) by noting that "the Court of Appeals held that the Union could also be liable under . . . § 1962(c) for conducting the affairs of the Fund and/or the affairs of the Fairfield Works through a pattern of racketeering activity." Opp. 16.

But respondents do not—because they cannot—do business with our showing that the assertion of those additional alleged "enterprises" does not justify the Eleventh Circuit's validation of the claims against *the Union* under § 1962(c) in which *the Union* is the alleged affected "enterprise." Pet. 13 n.6. Nor do respondents counter our showing that the allegations naming the Fund and the Fairfield Works as additional "enterprises" do not alter what this case is about at its core: whether the Union may properly be held liable under subsection (c) for the bribetaking by two of its employes that allegedly induced those employees to conduct their Union functions improperly. *Id.*[6]

Luthi v. Tonka Corp., 815 F.2d 1229 (8th Cir. 1987) (no liability for corporate "enterprise" under § 1962(c) for acts of corporate Treasurer and Chief Financial Officer).

[6] Respondents' invocation of the Union's District 36 as yet another allegedly affected enterprise, *see* Opp. 16, does not change the picture. The court below did not even find that claim worthy of mention. *See* Pet. App. 33a (referring only to the Fund and the Fairfield Works as enterprises distinct from the Union). District 36 is simply an administrative division of the Union—the District has no employees, treasury, or property of its own. It is not a separate legal entity and cannot be treated as a distinct "enterprise" for purposes of § 1962(c). *Cf. Lorenz, supra* note 4 (parent corporation not distinct from subsidiary for purposes of the non-identity rule).

Respondents also refer to the fact that they pleaded their case against the Union as a conspiracy claim rather than as a direct § 1962(c) claim. Opp. 17. But the court of appeals did not treat this distinction as making any difference, *see* Pet. App. 28a-33a (analyzing the case under § 1962(c)), and the court was correct in this respect. *See* Pet. 10 n.3.

C. In the end, then, respondents cannot escape the fact that this case presents a plain conflict on the major recurring RICO issue stated in the first question presented in our petition.

II. THE PATTERN ISSUE

The court below was unambiguous as to the acts that constituted the "pattern" discerned by the court: those acts consisted of the "illegal request" for pension credits that was made "during the 1983 negotiations," the "establish[ment]" of the pensions in 1984, and the "monthly payment[s] of pension benefits . . . from December 1984 to May 1988." Pet. App. 13a-14a. The Eleventh Circuit held that the negotiation and payment of this single alleged bribe constitutes a RICO pattern. That holding is in square conflict with decisions of five circuits. *See* Pet. 16-18.[7]

Respondents make no effort to show that *what the Eleventh Circuit held* can be reconciled with the decisions of the other circuits. Instead, respondents point to "facts" upon which the court below did *not* rely, in an effort to conjure up a different "pattern" from the one that was sustained by that court.

1. Respondents argue that the alleged pension bribe was offered not only to obtain concessions in the 1983 Fairfield Agreement, but also to induce Phillips and Rich

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[7] Respondents claim that one of the cases we have cited, *Roeder v. Alpha Indus. Inc.*, 814 F.2d 22 (1st Cir. 1987), is "no longer good law" in the First Circuit. Opp. 22. That is not so. Although *Roeder* was decided before this Court's decision in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), the proposition for which we have cited *Roeder* was reaffirmed by the First Circuit in *Apparel Art Int'l, Inc. v. Jacobson*, 967 F.2d 720, 723 (1st Cir. 1992) (Breyer, J.), where the court cited *Roeder* in explaining that, "however courts express the point, they have consistently held that a single episode does not constitute a 'pattern,' even if that single episode involves behavior that amounts to several crimes."

to act unfaithfully in the subsequent implementation and enforcement of the Agreement. Opp. 20-21. The court of appeals did *not* accept those allegations, much less rely on them. The district court granted summary judgment to the Union on respondents' allegations of faithless implementation and enforcement of the Fairfield Agreement, both because such a claim had not been pleaded and because there was no evidence to support it. Pet. App. 113a-116a. *See also* Pet. App. 155a (denying leave to amend the complaint). The court of appeals did *not* overturn the dismissal of that claim; the court held only that there was evidence to support respondents' claim that the *negotiation* of the Agreement itself—in which the labor cost concessions at issue here were contained—may have been affected by the alleged pension bribe, *not* that there was evidence to support a claim that Rich and Phillips were improperly influenced in any actions they took with respect to the subsequent *implementation and enforcement* of the Agreement. *See* Pet. App. 16a-26a.

2. Respondents also refer to a pension credit allegedly granted to a Union officer in Indiana. Opp. 12, 20. The court of appeals' holding in this regard was that discovery should be permitted on that matter. Pet. App. 63a. That court did not rely on that alleged episode in finding that plaintiffs had presented sufficient facts to establish a "pattern." Rather, the court held that the components of the single alleged bribe as described by that court at Pet. App. 13a-14a constitute the requisite "pattern." [8]

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[8] Respondents also assert that other Union officials attempted to "cover up" the alleged bribe of Rich and Phillips. Opp. 19. *See also* Opp. 20 (accusing the Union of "obstruction of justice"); Opp. 21 (referring to high Union officials). The court of appeals did not rely on these allegations in finding a pattern, *see* Pet. App. 13a-14a; and even if the allegations were taken at face value and were factored into the analysis, the conflict with other circuits would remain. The alleged "cover-up" would constitute no more than additional wrongdoing incident to a single transaction. *See, e.g., Apparel Art, supra* note 7, 967 F.2d at 723 (no pattern

Thus, notwithstanding respondents' efforts to make this case into something other than what the Eleventh Circuit found it to be, the holding of that court cannot be reconciled with the holdings of five other circuits.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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despite "several instances of criminal behavior," including "a cover-up").